Case No. 19-3149

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: THRIVEST SPECIALTY FUNDING, LLC

THRIVEST SPECIALTY FUNDING, LLC,
Petitioner,

v.

HONORABLE ANITA B. BRODY, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
Respondent.

THRIVEST'S REPLY IN SUPPORT OF ITS PETITION FOR WRIT OF MANDAMUS

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October 16, 2019

Petitioner Thrivest Specialty Funding, LLC ("Thrivest") submits this reply in support of its application for a writ of mandamus and in response to the answers filed by the Claims Administrator and Class Counsel.

ARGUMENT

In response to Thrivest's Petition, the District Court entered a Notice asserting its compliance with this Court's April 26, 2019 decision, but nevertheless "direct[ing] the Claims Administrator to review its guidance and rules regarding third-party funder agreements and [to] propose a streamlined and concise version that is more user-friendly." (September 27, 2019 Notice, Ex. A to Class Counsel's Answer). Thrivest did not seek mandamus relief because the Assignment Rules were too long, inaccessible or cumbersome; it sought to invoke this Court's extraordinary powers because the District Court and the Claims Administrator are contravening the mandate. The Assignment Rules and related procedures have not meaningfully changed in the nearly six months since this Court's decision or in the nearly one month since Thrivest filed its Petition. Thrivest respectfully requests this Court's assistance in compelling compliance with the mandate.

A. Contrary To This Court's Mandate, The District Court Continues To Communicate That Cash Advance Agreements Are Unenforceable (Except At 10% Simple Interest).

The Claims Administrator and Class Counsel cannot argue that the District Court takes no position on the enforceability of cash advance agreements when the

Assignment Rules did not meaningfully change after the Third Circuit's decision.[1] Indeed, the Assignment Rules continue to reference the District Court's December 8, 2017 Explanation and Order (the "Order") without any reference whatsoever to this Court's ruling overturning it in part. There, the District Court held that "Class Members are ***prohibited*** from assigning or attempting to assign any monetary claims, and any such purported assignment is ***void, invalid and of no force and effect.***" (Order [Dkt. 9517] at 4, Ex. A) (emphasis added).[2] The Claims Administrator's post-mandate Notice of Assignment Review Determination still references that Order and tracks its language—"We have determined that this transaction is an assignment that is ***prohibited.***" (Notice of Assignment Review Determination, Ex. E) (emphasis added). Consistent with this messaging, the Assignment Rules still refer to "Prohibited Assignments." (Assignment Rules, Ex. C). Lest there be any doubt, the District Court's Order said, "[a] Third-Party Funder that failed to perform proper due diligence before deciding to enter such an agreement is prohibited from now reaping the benefit of the contract," and "the Court

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[1] Neither the Claims Administrator, nor Class Counsel challenge Thrivest's assertion that removal of "Co-Lead" before "Class Counsel" constituted the only change to the Assignment Rules after this Court's April 26, 2019 decision. Nearly six months have passed since this Court vacated in part the District Court's Order. There was ample time to incorporate the Third Circuit's reasoning, but the District Court has done nothing.

[2] Unless otherwise noted, all exhibit references refer to the exhibits to Thrivest's Petition.

has little sympathy for a Third-Party Funder that will not receive a return on its 'investment.'" (Order [Dkt. 9517] at 4-5). Especially when paired with the Waiver Relinquishing Rights Under Attempted Assignment, the District Court's message remains unmistakable—cash advance agreements are not enforceable, anywhere. That message is a clear violation of the mandate and must be corrected.

The Claims Administrator acknowledges that it has no authority to offer legal advice to Class Members and that the "ultimate enforceability of any cash advance agreement ... is left up to a court or an arbitrator ... if there remains a dispute." (Claims Administrator's Answer at 5). But that disclaimer does not appear in the Assignment Rules or in any of the Claims Administrator's communications to Class Members (including the Notice of Assignment Review Determination). And thus there is no counterbalance to the strong, contrary language contained in the Order. Accordingly—and in the absence of relevant changes to the Assignment Rules following this Court's ruling—it is no surprise that Class Members continue to cite the District Court's words when seeking to avoid their obligations to Thrivest.[3] In

[3] In the Frequently Asked Questions section of its website, the Claims Administrator asks, "Can a Settlement Class Member assign rights to receive his or her Monetary Award or Derivative Claimant Award, or a portion of the Award, to a third party?" After responding "No," the Claims Administrator goes on to explain: "[i]f a Settlement Class Member entered into an agreement that assigned or attempted to assign any monetary claims:

> (1) The Settlement Class Member should return to the Third-Party Funder the amount already paid to him or her.

that regard, neither the Claims Administrator nor Class Counsel respond to Thrivest's evidence of confusion among Class Members—a telling silence.[4]

The Claims Administrator's answer is noteworthy, however, for its discussion of the District Court's "voluntary resolution process." (Id. at 3-4). Under the appearance of enforcing Section 30.1 of the Settlement Agreement—which this Court interpreted as prohibiting a funder from stepping into the shoes of a Class Member and seeking funds directly from the Claims Administrator—the District

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> (2) The Claims Administrator will withhold from an Award the amount a Third-Party Funder already paid to the Settlement Class Member and return that amount to the Third-Party Funder if that Third-Party Funder signs a valid waiver relinquishing any claims or rights under the entire agreement creating the assignment or attempted assignment. If the Third-Party Funder does not sign the waiver relinquishing any claims or rights, the Claims Administrator will not return any funds to the Third-Party Funder and the Claims Administrator will pay the applicable Award amount to the Settlement Class Member."

(FAQ 316, available at https://www.nflconcussionsettlement.com/FAQDetails.aspx?q=376#376, last visited October 15, 2019). Although the Claims Administrator updated the Frequently Asked Questions page after this Court's decision, FAQ 316 continues to imply that Class Members have only limited obligations to honor cash advance agreements with third-party funders—and there remains no reference whatsoever to this Court's decision.

[4] The attorney for Class Member Toby Wright once argued: "We are simply trying to have the matter resolved by the District Court, a district court who's already ruled that this agreement was void. Now, that was reversed because of lack of jurisdiction under the All Writs Act, but we would like to be in front of a judge that's already ruled that this is void." (Excerpt of Transcript of June 24, 2019 Emergency Hearing, attached as Exhibit I).

Court has authorized the Claims Administrator to pay funding companies directly from the settlement fund, so long as the funder "rescind[s] the prior cash advance agreement" and reduces its interest rate to 10% simple interest through a signed agreement with the Class Member. (Declaration of Consent to Substitution, and Termination and Release Agreement, attached as Exhibit J). In other words, if the funder and Class Member agree to set aside their prior agreement as a "Prohibited Assignment"—even if it was not a true assignment that allowed the funder to seek payment directly from the Claims Administrator—the District Court will allow the funder to "step into the shoes of the player and seek funds directly from the settlement fund" if it reduces the interest rate.[5] In Re: National Football League Players' Concussion Injury Litigation, 923 F.3d 96, 110 (3d. Cir. 2019). In this way, the District Court is selectively enforcing Section 30.1 of the Settlement Agreement and sending yet another inaccurate message to Class Members—that funding agreements are only enforceable at a rate determined by the Court, even if the stated rate is otherwise permissible.

[5] The Claims Administrator's acknowledgment of 24 transactions resolved through this settlement protocol is inconsistent with Class Counsel's statement that, "[a]ll that the district court has done is prohibit the Claims Administrator from making ***any*** payments directly to funders." (Claims Administrator's Answer at 3, Class Counsel Answer at 7) (emphasis added). The District Court has authorized payments directly from the settlement fund, so long as they are limited to a 10% return. If the Claims Administrator can recognize and enforce these agreements, why are other signed agreements between funders and Class Members any less suited to recognition?

It is evident that the District Court is not following the mandate and, thus, is both abusing its discretion and committing errors of law.[6] Class Counsel suggests that Thrivest is quibbling over "minutiae" in the "day-to-day administration of the settlement" (Class Counsel's Answer at 1, 6), but it is clear and irrefutable that the District Court has failed to heed this Court's mandate in significant and meaningful ways. The Court should exercise its mandamus power and issue a writ directing implementation of the relief requested.

B. Thrivest Raised These Same Concerns Via Letter Motion In The District Court And The District Court Rejected Thrivest's Request For Action; Thrivest's Petition Is Ripe.

Class Counsel's assertion that Thrivest merely requested a conference to discuss "generalized concerns" is bunk. (Class Counsel's Answer at 7). Initially, Thrivest filed its request via letter (Dkt. 10734); however, after the District Court instructed Thrivest to re-file its letter as a motion to prompt Court action, Thrivest filed its request via letter motion. (Thrivest's July 12, 2019 Letter Motion [Dkt. 10736], Ex. D). That letter motion set forth the same arguments articulated here,

[6] Class Counsel argues that the mandate has been "fulfilled" because the District Court confirmed an Interim Award in Thrivest's arbitration against Class Member William White and recently held a hearing on Thrivest's still pending Motion for Contempt after Mr. White did not comply with the relief ordered. (Class Counsel's Answer at 4-5). Issues of arbitrability are beyond the scope of the instant petition, but the more than three month delay between the Order confirming the Interim Award (July 1, 2019) and the hearing on Thrivest's Motion for Contempt (October 10, 2019) demonstrates that the District Court has yet to embrace the mandate.

and in similar detail. The Claims Administrator responded in defense of the Assignment Rules, and the District Court had ample opportunity to consider these issues before concluding that further action was "unnecessary." (August 15, 2019 Order [Dkt. 10807], Ex. H). Only the most naïve would think that the District Court rejected Thrivest's request on procedural grounds, and there is nothing in the Court's ruling to suggest a procedural deficiency. Indeed, the inadequacy of other means of relief is demonstrated by the fact that the District Court waited until after Thrivest filed the instant petition to issue its September 27, 2019 Order directing the Claims Administrator to undertake the review requested by Thrivest in July. The Court should reject Class Counsel's invitation to sidestep these important issues.

C. Ignoring The Mandate Causes Irreparable Injury To The Administration Of Justice; Nevertheless, Thrivest Has Demonstrated Real Consequences Justifying Action Here.

Thrivest argued that the District Court's failure to abide the mandate is sufficient injury, in and of itself, to the administration of justice warranting mandamus relief. Neither the Claims Administrator nor Class Counsel addressed this point. The consequences, however, are not just theoretical. On the contrary, the District Court's erroneous communications are multiplying proceedings as Class Members rely on them to disregard their contractual promises. What could be more irreparable than a litigant making decisions based upon inaccurate and misleading information? The injury here is the cloud over Class Members' decision-making

created by the District Court's refusal to follow this Court's clear guidance. And that cloud has real consequences. As these disputes grow, so too do the financial stakes—in terms of additional interest, enforcement expenses, and arbitration costs that are incurred every passing day. Whether borne by Thrivest or assessed against Class Members (under the provisions in Thrivest's Agreement), these financial consequences will cause injury to one side or the other. The circumstances here clearly warrant action.

CONCLUSION

The imprimatur of the Court is a powerful tool. The District Court's Assignment Rules and related communications wrongfully imply that cash advance agreements are not enforceable, even outside of the Claims Administration process. This Court invalidated that approach, but the District Court ignored the mandate and did not change course. Action is needed. Mandamus is warranted.

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Thrivest Specialty Funding, LLC

October 16, 2019

EXHIBIT "I"

AMERICAN ARBITRATION ASSOCIATION

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THRIVEST SPECIALTY FUNDING, LLC, Claimant	:	No. 01-19-0001-5334
	:	Telephonic Hearing
vs.	:	
TOBY L. WRIGHT, Respondent	:	

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Monday, June 24, 2019

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Telephonic arbitration hearing in the above-captioned matter was held at the offices of Fox Rothschild, 2000 Market Street, 20th Floor, Philadelphia, Pennsylvania 19103, beginning at 10:00 a.m., on the above date, before DEBRA ANNE GERSTEMEIER, Registered Professional Reporter and Notary Public of the Commonwealth of Pennsylvania.

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contract was signed years earlier, so the argument that this is a post-settlement agreement and therefore not legal funding is completely false.

Mr. Buckley says we're bringing this argument because we're trying to walk away from Mr. Wright's obligations. That is not true. We are simply trying to have the matter resolved by the District Court, a district court who's already ruled that this agreement was void. Now, that was reversed because of lack of jurisdiction under the All Writs Act, but we would like to be in front of a judge that's already ruled that this is void. Thrivest doesn't want to be in front of that judge. That's simply the posturing that's going on. However, our client never consented to this commercial proceeding. This emergency relief

EXHIBIT "J"

NFL CONCUSSION SETTLEMENT
IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION
No. 2:12-md-02323 (E.D. Pa.)

DECLARATION OF CONSENT TO SUBSTITUTION

A. FUNDER

Name				
Address	Street/P.O. Box			
	City		State	Zip
Telephone		**Email**		

B. IDENTIFIED SETTLEMENT CLASS MEMBERS

The Funder has made advances of cash to each of the Settlement Class Members identified on the list attached as **Exhibit A**, which includes at least: (a) names of Settlement Class Members; (b) the last four digits of their Social Security Numbers; (c) names of their lawyers or law firms, if applicable; (d) the amounts paid to or on behalf of each Settlement Class Member; and (e) the dates each advance was paid.

C. CONVERSION TO LOAN TRANSACTIONS

To the extent any of these transactions are prohibited assignments in accordance with the Court's 12/8/17 Explanation and Order, all such transactions are to become terminated and converted into loan transactions as follows:

(a) The loan amount will be the principal amount paid to the Settlement Class Members or on his/her behalf. This does not include transaction fees, which may have been subtracted from the total purchase price or advance amount as contemplated in the original assignment documents.

(b) The interest rate on the loan(s) will be 10% based on a simple interest rate from the date of the payment to the Settlement Class Member or to a third-party on the Settlement Class Member's behalf and shall continue until the loan is paid.

(c) The loan transaction will be non-recourse and its only collateral will be the Settlement Class Member's Monetary Award payment, when and if the Settlement Class Member receives one. The Funder agrees that no action will be taken for the prior prohibited transaction entered into previously as long as the Settlement Class Member accepts its termination and the substitution of a loan transaction as described above.

To the extent any of these transactions are already loan transactions with interest rates that exceed 10%, the interest rate on the loan(s) will be reduced to 10% based on a simple interest rate from the date of the payment to the Settlement Class Member or to a third-party on the Settlement Class Member's behalf and will continue until the loan is paid.

DECLARATION OF CONSENT TO SUBSTITUTION

A copy of this Declaration will be on file with the Claims Administrator. After the Claims Administrator has issued a Notice of Monetary Award to a Settlement Class Member identified on Exhibit A, and provided the Settlement Class Member has provided consent, the Claims Administrator will contact the Funder to provide the form of Termination and Release Agreement in use at that time. The Funder will complete the Termination and Release Agreement and coordinate with the Settlement Class Member (or his/her lawyer, if the Settlement Class Member is represented) to obtain the Settlement Class Member's signature. By signing the Termination and Release Agreement, the Settlement Class Member will confirm his/her agreement to accept the substitution contemplated in this Declaration.

D. SIGNATURE

By signing below, I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that (1) I am authorized to sign this Declaration on behalf of the Funder; and (2) all information provided in this Declaration is true and correct to the best of my knowledge, information and belief.

Signature	
Name	
Title	
Date	

NFL CONCUSSION SETTLEMENT

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION
No. 2:12-md-02323 (E.D. Pa.)

TERMINATION AND RELEASE AGREEMENT

DEADLINE FOR RECEIPT OF COMPLETED AGREEMENT: [TO BE COMPLETED BY THE CLAIMS ADMINISTRATOR]

A. PARTIES

Settlement Class Member	
Funder	
Covered Parties	The term Settlement Class Member includes his/her heirs, agents, guardians, successors, and assigns. The term Funder includes all of its representatives, predecessors, successors, affiliates, subsidiaries, owners, officers, directors, employees, agents and insurers. The term Parties refers to the Settlement Class Member and the Funder.

B. THE CONTRACT

Date(s) of the Contract	
Status	There are now no pending actions between the Settlement Class Member and the Funder relating to the Contract. However, there are potential disputes between the Parties involving the Monetary Award Claim filed by the Settlement Class Member in the NFL Players Concussion Settlement and possible claims of the Parties against each other under the Contract. Funder hereby warrants and represents that it has not assigned or transferred to any third party any claim, demand, or cause of action against the Settlement Class Member.

C. LOAN RESOLUTION AMOUNT

Amount	$
Resolution	The Claims Administrator may pay the Loan Resolution Amount to the Funder as the amount due from the Settlement Class Member to the Funder.

D. CONSIDERATION AND RELEASE

(a) Payment. The Funder agrees to accept from the Trustee of the Settlement Fund of the NFL Concussion Settlement the Loan Resolution Amount as consideration for this Agreement.

(b) Mutual Release. Except with respect to the terms and conditions in this Agreement, the Settlement Class Member and the Funder hereby fully and forever mutually release, acquit, terminate, and discharge each other from any and all claims (express or implied) which the Parties ever had, now have, or may have against each other for or by reason of the financial transaction referred to in this Agreement as the Contract, which is terminated and superseded by this Agreement.

(c) Waiver of All Claims. Except with respect to the terms and conditions in this Agreement, the Parties agree that they will not file nor permit to be filed on their behalf, any claim, grievance, charge, complaint, lawsuit, legal action, or other process of any kind against each other arising out of or related to the circumstances of the Contract and/or the Monetary Award Claim.

TERMINATION AND RELEASE AGREEMENT

DEADLINE FOR RECEIPT OF COMPLETED AGREEMENT: [TO BE COMPLETED BY THE CLAIMS ADMINISTRATOR]

(d) Termination of the Contract. The Parties agree that, upon execution of this Agreement, the Contract and any rights held under it are terminated.

(e) Settlement Class Member. The Settlement Class Member consents:

(1) To the substitution set forth in the Declaration of Consent to Substitution signed by Funder and attached to this Agreement;
(2) To the Claims Administrator of the NFL Concussion Settlement Program disclosing to the Funder the status of his/her claim and the amount of the Monetary Award.

(f) Entire Agreement. This Agreement sets forth the entire understanding between the Parties and supersedes any prior agreements, including the Contract, or understandings, express or implied, pertaining to the Contract and/or the Monetary Award Claim.

E. SIGNATURE

Funder	**Signature**	
	Name	
	Title	
	Date	
Settlement Class Member	**Signature**	
	Name	
	Date	

CERTIFICATE OF SERVICE

I, Peter C. Buckley, Esquire, hereby certify that I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Third Circuit via the Court's CM/ECF system on October 16, 2019

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by this Court's CM/ECF system.

/s/ Peter C. Buckley

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